

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES J. ESLER,

Plaintiff,

v.

Case No. 05-C-251

SUBWAY,

Defendant.

ORDER OF DISMISSAL

On March 7, 2004, Plaintiff James J. Esler filed this *pro se* action alleging that he was discharged from a Subway store in Appleton, Wisconsin based upon his disability. I construed Esler's complaint as stating a claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Esler was allowed to proceed *in forma pauperis*. In granting his petition to proceed *in forma pauperis*, however, I specifically noted that it appeared that Esler had not named the proper party. Subway, I noted, was a registered trade name for a popular restaurant franchise that operated throughout the United States. I suggested to Esler that the Subway restaurant where he was employed was either owned by an individual, a partnership or a corporation, or some other legal entity that could be sued. If that was the case, I specifically suggested to Esler that the complaint was subject to dismissal upon a proper motion unless he amended the complaint and served in on the proper party.

Esler took no action in response to this court's suggestion. Now before me is the defendant's motion to dismiss for failure to name a proper party, pursuant to Rule 12(b) of the Federal Rules

of Civil Procedure. In an affidavit accompanying the motion, Michael Mortier states that he is the owner of Mor-Subs, Inc., a Wisconsin corporation which owns and operates the Subway store where Esler was briefly employed. Obviously, Mor-Subs, Inc., is the proper party, not Subway. Accordingly, the defendant's motion is granted and this matter is hereby ordered dismissed. *See Ellis v. United States Postal Inspector*, 784 F.2d 835 (7th Cir. 1986). The dismissal is not on the merits, however, and is without prejudice.

SO ORDERED.

Dated this 18th day of July, 2005.

s/ William C. Griesbach
William C. Griesbach
United States District Judge